TENGKU HAJI JAAFAR & ANOR. v. GOVERNMENT OF THE STATE OF PAHANG

[O.C.J. (Abdul Razak J.) August 30, 1977]
[Kuantan — Civil Suit No. 67 of 1976]

Government Proceedings — Interim injunction — Application to restrain Government from dealing with property — Property subject matter of civil suit — Government Proceedings Ordinance, 1958, s. 29(1).

The applicants applied for an interim injunction to restrain the respondent from dealing with the property the subject of the civil suit between the applicants and the respondent. The plaintiff-applicants claimed that the land was a gift to the plaintiff from the first Sultan of Pahang in or about the year A.H. 1305. The State Government disputed the claim. The applicants alleged that the State Government was likely to proceed with the alienation of certain portion of the land for development by way of lease, licence or outright alienation despite current proceedings in court and had disposed certain portions to various bodies without the consent of the applicants thus causing loss to the latter.

Held, dismissing the application: greater hardship and inconvenience would be caused to the respondent than the applicants if the injunction was issued at that stage as Government endeavours would be put to a halt in a vast territory of land where the question was yet to be determined as to whether the plaintiff would succeed at the trial or not.

Cases referred to:-

(1) *International General Electric Co. of New York Ltd.* v. *Commissioners of Custom and Excise* [1962] 2 All E.R. 398.

(2) *Harper* v. *Secretary of State* [1955] 1 All E.R. 331.

(3) *Attorney-General for New South Wales* v. *Trethowan* [1932] A.C. 526.

(4) *Underhill* v. *Ministry of Food* [1950] 1 All E.R. 593.

CIVIL SUIT.

H.L. Tennakoon for the plaintiff.

Ahmad bin Haji Abdul (State Legal Adviser) for the defendant.

Abdul Razak J.: This is an application for an interim injunction to restrain the respondent the Government of the State of Pahang from dealing with the property the subject of the civil suit between the applicant and the respondent. The Order asked for reads as follows: —

"1. The respondent be restrained whether by themselves or by their servants or agents from dealing with all or any portion or portions of the piece of land forming the basin of the Sungei Tembeling and all its tributaries from their sources to their mouths by way of lease licence sale or in any manner whatsoever for any interest whatsoever until final disposal of Kuantan High Court Civil Suit No. 67 of 1976."

The suit relates to a claim by the plaintiff for the land the subject matter of the present application purportedly given to the plaintiff under a gift by the first Sultan of Pahang Almarhum Sultan Ahmad Muadzam Shah in or about the year A.H. 1305. The State Government disputes the claim.

The applicant avers in his affidavit that the State Government is intending to alienate certain portions of the land for development by way of lease, licence or outright alienation. He also alleges that the State Government is likely to proceed with the alienation despite the proceedings now in court and also that certain portions have been previously disposed of to various bodies without his consent or the consent or knowledge of person claiming title to the said land. He alleges that such dealings had caused loss to the applicant. The respondent in his affidavit in reply disputes the claim but does not advert to the applicant's allegation of the disposal of the land or to the alleged loss thereby.

In his application for an interim injunction counsel for the applicant referred me to section 29(1) of the Government Proceedings Ordinance and conceded that the section does not allow a final injunction to lie against the Government but instead a declaratory order may be made. The section reads:

"29. (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof."

Counsel submitted in the proper construction of the section the word "injunction" refers only to a permanent injunction and not to an interlocutory injunction. It does not prevent therefore the court from granting in appropriate cases interlocutory injunctions. Reference was made to the case of *International General Electric Company of New York Ltd.* v. *Commissioners of Customs and Excise*[1] for saying that a doubt exists whether an interim injunction can be issued in lieu of an interim declaration. In that case the court held that it had no power to grant an interim declaration in lieu of an interim injunction. In that case the judges were seen clearly of the view that an interim injunction could not be issued against the Crown. Upjohn L.J. at page 399 para. H said "It will be observed that the form of the motion is unusual. It does not ask for an interlocutory injunction, and for this good and sound reason, that, as the defendants are a department of the Crown, no injunction could be obtained against them."

Evershed M.R. in *Harper* v. *Secretary of State*[2] seemed however to hesitate to say that an interim injunction cannot lie against the Government. In *Harper* the Home Department was cited as a party. This is what Evershed M.R. said regarding the status of the Crown "On the other hand if he does sue him and rightly sues him, in his capacity as Secretary of State, then I am not satisfied, though I express no final view on it, as we have not heard full argument, that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947 an interim injunction will lie."

In *A.G. for New South Wales* v. *Trethowan*[3] cited in *Harper* above an injunction lay, however, against the Government. Evershed J. did not in that case consider whether the court had in law the right to issue an injunction against the Crown in the first place but whether on the facts there were merits in

the application for the injunction and the Privy Council held that the court below had. The *New South Wales case* is in my view quite pertinent because there an injunction was sought to restrain the Minister from taking a Bill to the Sovereign for the purpose of its becoming law and the Privy Council held the injunction was properly issued. No doubt it could be argued the case was before the English Crown Proceedings Act 1947 (which is *in pari materia* with our Government Proceedings Ordinance) was passed but basically the grounds of the application of the principle should be the same. The injunction made against the A.G. in the *New South Wales case* above was by reason of the case under which it was made being before 1947 impliedly issued under a petition of right. The right and remedies formerly available against the Crown under the petition of right are preserved by the provision of the Crown Proceedings Act 1947 by the definition given to the word "Proceeding" therein in the statute. It seems to me from the foregoing that the strict and just application of section 29(1) of the Government Proceedings Ordinance would necessarily require, therefore, that an interlocutory injunction must lie against the Government if only to give effect to the provision that a declaratory order only may be made against the Government since without an interim injunction the Government would be free to act to effect if necessary the ultimate destruction of the subject matter of the declaration and thus render the purport and effect of the section nugatory and useless. It is said that no injunction at all could be issued against the Government because the section says so. But it is also said by the section that such relief may be had against the Crown as may be given as between subjects. Thus said, in my view in order to achieve a proper balance as between the right of the individual to obtain relief against the Crown and the right of the Crown to limit that relief to merely getting a declaratory order, an interim injunction becomes necessary only in order to preserve the *status quo* of the parties pending the declaration otherwise the whole object of the section is *ab initio* defeated.

The judgment of Romer J. in *Underhill* v. *Ministry of Food*[4] seems to lend weight to the contention that an interim injunction is not inconsistent with section 21 of the Crown Proceedings Act (which is our section 29(1) of the Government Proceedings) because of his view that the declaration contemplated by the section is a final as opposed to an interim injunction. He said "I do not think that this court has jurisdiction under section 21 of the Act to make something in the nature of an interim declaration of right which have no legal effect, and which, as I say, might be the very opposite of the final declaration of right made at the trial after hearing all the evidence". By implication it must necessarily follow therefore that since the section provides for the giving of a declaration in lieu of an injunction, the injunction so stated must refer to a permanent and final injunction and it does not take away therefore the right of the court to grant an interlocutory injunction.

Having said that the question which remains to be asked is nevertheless whether on merits the injunction should issue. This is something which I must confess is not without its difficulty. Whether the plaintiff would be able to succeed in their claim is left to be seen and would be no doubt a subject matter of an exhaustive study when the time comes. The general principle is that as stated by *Halsbury's* at page 366 Volume 21. "The court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff." The court has to consider what would be the terms and the consequence if the injunction is or is not granted to the parties. In this respect the applicant said that if the injunction is granted they are prepared to give merely a personal undertaking on damages should they fail in their claim but at this stage where the land is still without a proper demarcation as to its actual area where is the injunction to lie without causing the order impracticable if not impossible to enforce. No doubt the necessary order would be that a proper survey be made of the subject land if and when the declaration is eventually made at the trial. That is something which is left to be determined. We are concerned however with the present.

There is another matter which has a great bearing on this application. There is no undertaking as to security on damages given by the applicant other than his bare assurance. Of course, it is not always the rule that a security must be given in all cases of a personal undertaking. The odds must be weighed between the chances of success and the nature of the subject matter involved and its value and the inconvenience and hardship and great loss that the respondent or the applicant may suffer if the injunction is not granted. In my view, however, greater hardship and inconvenience would be caused to the respondent than the applicant if the injunction is issued at this stage considering that Government endeavours will be put to a halt in a vast territory of land where the question is still undecided as to whether the plaintiff will succeed at the trial or not.

The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Tennakoon, Selva & Co.*